



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Scheduled Airlines Traffic Offices, Inc.

File: B-229883

Date: March 22, 1988

DIGEST

1. The Under Secretary of the Army has the authority to review, vacate, and make source selection decisions under a procurement using formal source selection procedures under Federal Acquisition Regulation, even where a lower source selection authority has made a contrary selection.
2. The Under Secretary of the Army's decision to vacate a lower echelon source selection authority's selection of the protester for award and instead select a technically superior offeror was reasonable and in accordance with the evaluation criteria of the solicitation.

DECISION

Scheduled Airlines Traffic Offices, Inc. (SATO), protests the award of a contract to Ask Mr. Foster, Inc., pursuant to request for proposals (RFP) No. DAKF49-87-R-0001, issued by the United States Army, Fort Sam Houston, Texas, for official and unofficial travel services for the Fifth Army Region. SATO's basic contention is that the Under Secretary of the Army improperly, unreasonably and without authority vacated the decision to select SATO for award made by the properly designated source selection authority (SSA) and instead selected Ask Mr. Foster.

We deny the protest.

The RFP requested technical, business management and concession fee proposals and advised that the technical factor was approximately twice as important as the business management factor, which was approximately three times as important as the concession fee factor. Detailed subfactors were specified for each of these evaluation factors. Award was to be made to the offeror whose proposal provided the best overall benefit to the government with appropriate consideration given to the listed evaluation factors.

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Offerors were required to propose a concession fee of not less than 3 percent of total gross sales for unofficial travel. This concession fee was required to be paid by the awardee to the accounts of various Department of Defense nonappropriated fund activities as unofficial travel was booked under the contract.

Ten proposals were received in response to the RFP and seven were included in the competitive range. Discussions were conducted and best and final offers (BAFOs) were received by July 23, 1987. SATO proposed a 10.4 percent concession fee in its BAFO while Ask Mr. Foster proposed a 5 percent fee. The Source Selection Evaluation Board (SSEB) evaluated the BAFOs and found the top ranked two proposals were submitted by (1) Ask Mr. Foster, which received a 55.63 technical score, 26.56 business management score, and a 8.85 concession fee score for a total score of 91.04 out of a possible 100 points and (2) SATO, which received a 54.20 technical score, a 27.07 business management score and a 9.69 concession fee score for a total score of 90.96 points. The SSEB completely documented the relative strengths and weaknesses of the seven proposals.

The SSEB presented its findings, including a detailed discussion of proposal strengths and weaknesses, to a Source Selection Advisory Council (SSAC) and the SSA. These briefings only referenced offerors by number designations; the identity of the offerors was not revealed. Neither the SSEB nor the SSAC made any recommendation as to which firm should be selected for award, although the SSEB recommended that only the top two ranked offerors be considered. The SSAC issued no report and made no recommendations, per se, although the Army reports that of the six SSAC members, four recommended award to Ask Mr. Foster and two recommended award to SATO.

On August 13, the SSA selected SATO for award after "full consideration of the proposals, the evaluation and discussion and advice from my [SSAC]." The SSA stated that the technical and management approach of each offeror was strong and there was a significant difference between the offerors only in the amount of concession fee, where SATO will return a greater amount to the government. Indeed, the SSA "found this to be the critical discriminator between these essentially equal proposals."

The Under Secretary immediately requested that he be briefed regarding the SSA's selection decision. On August 21, the Under Secretary was given a detailed briefing of the evaluation process. He requested additional information and received the SSEB and SSAC comments, adjectival ratings,

scores and comparative strengths and weaknesses for all evaluation factors of the two offerors' proposals.

On December 17, the Under Secretary decided to vacate the SSA's selection decision and to select the Ask Mr. Foster proposal as the most advantageous to the government under the RFP's evaluation criteria. He concluded, based upon his independent review of the evaluated strengths, weaknesses, and scores, that the technical superiority of Ask Mr. Foster's proposal outweighed the "small advantage in concession fee rebates offered by SATO." In particular, the Under Secretary "discerned" "significant differences" between SATO and Ask Mr. Foster in the latter's favor in the areas of quality control and staffing. Although he recognized SATO's advantage in personnel qualification standards, he found Ask Mr. Foster's training curriculum substantially compensated for this technical difference. The Under Secretary also stressed that the technical factor was the primary evaluation factor, six times as important as the concession fee factor, such that he could not agree that the proposed concession fee could serve as the primary means to distinguish between the proposals in view of Ask Mr. Foster's technical superiority. After the protest was filed, the Under Secretary specifically found the SSA's source selection decision was unreasonable since it did not sufficiently consider the greater weight that should be accorded technical factors.

SATO protests that the Under Secretary did not have the authority to "vacate" the SSA's decision, since the SSA was the official in charge of selecting the contractor under the formal source selection procedures contained in Federal Acquisition Regulation (FAR) § 15.612 (FAC 84-5). SATO explains that the RFP indicated that formal source selection procedures would be employed and the agency was prohibited from materially deviating from these procedures by having an official other than the properly designated SSA from making the award selection. SATO argues that the Under Secretary has not been delegated the authority under 10 U.S.C. § 2305(b) (Supp. III 1985), as was the SSA, to make award under competitive proposal procurements, and that he does not possess this authority either by virtue of his position as Under Secretary or as Army Acquisition Executive (AAE). Consequently, SATO contends the Under Secretary can only perform ministerial oversight functions to assure the SSA's decision is in accordance with law. SATO contends the Under Secretary acted improperly in vacating the SSA's decision without demonstrating it was unreasonable and that this breached the implied contract between the Army and SATO that formal source selection procedures be employed under this RFP.

It is clear that the Under Secretary had the authority to make the source selection under this RFP. In this regard, we have consistently held that the authority of agency supervisory or secretarial level officials to direct and supervise agency functions of lower echelon agency components necessarily encompasses procurement operations, including the evaluation of proposals and the award of contracts. Bank Street College of Education, 63 Comp. Gen. 394 (1984), 84-1 CPD ¶ 607; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325; AFL-CIO Appalachian Council, Inc., B-216878, Apr. 12, 1985, 85-1 CPD ¶ 419. That is, such officials are authorized to review source selection decisions, reverse or vacate those decisions and make their own reasonable source selection decisions in accordance with the RFP evaluation criteria.^{1/} Id. Although SATO distinguishes Grey Advertising as permitting a supervisory agency official to vacate a source selection decision only where his review is provided for under agency regulations, in both Bank Street and AFL-CIO Appalachian Council no such regulations are cited; the supervisory and management responsibility of the higher officials in those cases permitted them to intervene in the source selection process.^{2/}

Here, as SATO concedes, the Secretary of the Army has been given the authority to make source selections and awards under competitive proposal procedures; the SSA's source selection authority flows from that authority granted the Secretary. 10 U.S.C. § 2305(b); Bank Street College of Education, 63 Comp. Gen. supra. The Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. 99-433, authorizes the "Office of the Secretary of the Army" to assist the Secretary in carrying out his "responsibilities." 10 U.S.C.A. § 3014(a)(West Supp. 1987). That Act provides that the Office of the Secretary, which includes the Under Secretary, see 10 U.S.C.A. § 3014(b), "shall have

1/ SATO cites no legal support for its proposition that the Under Secretary can only "vacate" a SSA decision if that decision is unreasonable.

2/ Contrary to SATO's assertion, FAR § 15.612 does not preclude higher agency officials from exercising such authority nor is there any implied contract under this RFP that any particular individual will make the source selection. Indeed, the RFP here does not mention who the SSA is, much less require the Army to use any particular SSA; it only requires that evaluation and selection be consistent with the RFP's stated evaluation criteria.

sole responsibility" within the Army for seven designated functions, including "acquisition." 10 U.S.C.A. § 3014(c)(A). Moreover, the Act requires the Secretary to establish a "single" office or other entity within the Office of the Secretary to "conduct" the acquisition function. 10 U.S.C.A. § 3014(c)(2).

The Under Secretary was designated by the Secretary as the AAE. It is true that this designation did not specifically state that the Under Secretary could review, vacate, or make source selection decisions pursuant to 10 U.S.C. § 2305(b). However, we find such authority is inherent in the Under Secretary's designation as the AAE, the individual responsible for "conducting" the "acquisition" function within the Army. See Bank Street College of Education, 63 Comp. Gen. supra.

SATO also protests that the Under Secretary's selection of Ask Mr. Foster was unreasonable. SATO claims that its technical proposal was equal to the Ask Mr. Foster technical proposal, as was found by the SSA, such that the proposed concession fees should properly have been the discriminating factor for award. In this regard, SATO contends that the Under Secretary did not elaborate on the alleged significant advantages of Ask Mr. Foster's quality control and staffing and that the Under Secretary understated SATO's concession fee superiority. SATO also contends the Under Secretary's decision is less reasonable than the SSA's decision because of the Under Secretary's relative lack of expertise in travel matters vis a vis the SSA; that he was not briefed in the blind regarding the identities of the offerors as was the SSA; and that he considered less information than did the SSA in making the award decision.

We have found that the official ultimately making the selection is not bound by the recommendations or point scores of evaluators, but must determine if he agrees that the point scores are indicative of technical superiority and what the difference may mean in contract performance. Barron Builders and Management Co., B-225803, June 30, 1987, 87-1 CPD ¶ 645; Moorman's Travel Service, Inc.--Request for Reconsideration, B-219728.2, Dec. 10, 1985, 85-2 CPD ¶ 643. The judgment of the selection official concerning the significance of the difference in technical merit of the proposals and whether or not the proposals are technically equal will be afforded great weight by our Office. Id.

Here, although the SSA found SATO and Ask Mr. Foster were technically equal, the Under Secretary found that Ask Mr. Foster's proposal was technically superior. As outlined above, the record confirms that the Under Secretary received an extensive, detailed and accurate analysis of these

offerors' relative strengths and weaknesses in each evaluation area. Contrary to SATO's assertion, the record shows that the information made available to the Under Secretary was substantially that presented to the SSA. Although SATO claims the SSA decision was more reasonable because he was unaware of the identity of the offerors, there is no legal requirement that a source selection official be ignorant of the identity of the potential awardees when he makes a source selection decision, nor does this necessarily negatively reflect on the reasonableness of the source selection decision. Similarly, the source selection official need not be an expert in the subject matter of the procurement; the function of the SSEB and SSAC is to provide expert advice to the source selection official.

SATO complains that the Under Secretary did not adequately elaborate on Ask Mr. Foster's relative strengths in quality control and staffing, which formed the primary basis for the Under Secretary's determination that Ask Mr. Foster's proposal was technically superior. However, the record confirms that Ask Mr. Foster's quality control was rated significantly higher by the SSEB. In this regard, the SSEB found that Ask Mr. Foster's quality control plan included a more comprehensive inspection system, was staffed with more people and provided a formal quality control training program, whereas SATO proposed a less sophisticated quality control system.

The record also confirms that Ask Mr. Foster proposed significantly more staffing than SATO for each manned site, specifically in the quality control, accounting and management areas. While SATO complains about the Under Secretary's mention of additional accounting staff, contending that this was not encompassed in the evaluation criteria, the proposed staffing plan was a listed technical evaluation subfactor and accounting personnel seem important to the successful performance of the contract work.

The Under Secretary specifically noted SATO's primary relative strength in personnel qualification standards. However, he concluded that Ask Mr. Foster's training curriculum, which the SSEB found was more detailed than SATO's training plan, substantially compensated for this difference.

Based on the foregoing, we cannot find unreasonable the Under Secretary's determination that Ask Mr. Foster's proposal was significantly superior to SATO's technical proposal, even though the technical point score difference

was only 1.43 out of 60 points.^{3/} On the other hand, the Under Secretary noted that the concession fee factor was one sixth the weight of the technical factors, such that Ask Mr. Foster's significant technical advantage should overcome SATO's higher concession fee. See Moorman's Travel Service, Inc.--Request for Reconsideration, B-219728.2, supra, where the source selection official reasonably found a proposal, which received one half of one point higher technical score on a 100-point scale, was technically superior to the other proposal such that a higher proposed concession fee was not considered appropriate to use as the award selection factor.^{4/} Moreover, we stated that the proposed concession fee does not have the same legal significance as evaluated cost or price in making a award selection. Moorman's Travel Service, Inc.--Request for Reconsideration, B-219728.2, supra.

Based on our review of the record, we find the Under Secretary's selection of Ask Mr. Foster, which received from the SSEB the highest overall point score, including consideration of concession fee, was reasonable.^{5/}

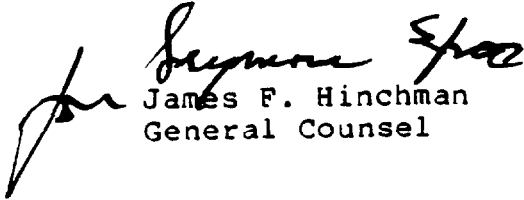
^{3/} As noted by the Army, the particular scoring method employed by the SSEB, where each evaluation factor is scored on a 100-point scale and adjusted by a multiplier to give it appropriate weight, tended to suppress numerical differences between the offers. For example, the point scores of the seven proposals in the competitive range were within 10 points of each other. Under such circumstances, a small difference in score can reflect a relative large difference in the evaluation.

^{4/} SATO attempts to distinguish Moorman's Travel Service from this case by arguing that the difference in concession fees is much larger in this case and that the concession fee was not a weighted criterion, but was only a "tiebreaker" in Moorman's Travel Service. However, here Ask Mr. Foster's technical superiority is more pronounced than the awardee's advantage in Moorman's Travel Service and Ask Mr. Foster has received the highest point score, taking into account the weighted score given the proposed concession fees.

^{5/} SATO has conceded that the SSEB's evaluation was reasonable.

Finally, we find no support on the record for SATO's contention that the Under Secretary was unduly influenced by political motivations rather than the evaluation criteria.

The protest is denied.

James F. Hinchman
General Counsel